

---

---

**IN THE  
Supreme Court of Virginia**

---

**RECORD NO. \_\_\_\_\_**

---

PEGASYSTEMS INC.,

Appellant,

v.

APPIAN CORPORATION,

Appellee.

---

**BRIEF OF AMICUS CURIAE  
THE AMERICAN INTELLECTUAL  
PROPERTY LAW ASSOCIATION**

---

Richard T. Matthews (VSB# 71241)  
Williams Mullen, P.C.  
301 Fayetteville Street, Suite 1700  
Raleigh, NC 27601  
Phone: (919) 981-4000  
rmatthews@williamsmullen.com

*Counsel for Amicus Curiae, AIPLA*

---

---

## TABLE OF CONTENTS

Table of Authorities .....	ii
I. Interest of Amicus Curiae .....	1
II. Introduction .....	1
III. Argument.....	3
IV. Conclusion.....	9
Certificate .....	11

## TABLE OF AUTHORITIES

### CASES

<i>ADA Motors, Inc. v. Butler</i> , 7 Wn. App.2d 53, 432 P.3d 445 (Wash. App. 2018). .....	8
<i>Advanced Systems Engineering Corp. v. Intuitive IT LLC</i> , 96 Va. Cir. 245 (2017).....	4
<i>Alifax Holding SPA v. Alcor Scientific Inc.</i> , 404 F.Supp.3d 552 (D.R.I. 2019).....	9
<i>Babcock &amp; Wilcox Co. v. Areva NP, Inc.</i> , 292 Va. 165, 788 S.E.2d 237 (Va. 2016).....	3
<i>Balzar &amp; Associates, Inc. v. Lakes on 360, Inc.</i> , 250 Va. 527, 463 S.E.2d 453 (Va. 1995).....	5
<i>Banks v. Mario Indus.</i> , 274 Va. 438, 650 S.E.2d 687 (2007) .....	4
<i>Barney v. Commonwealth</i> , 73 Va. App. 599, 863 S.E.2d 877 (2021).....	8
<i>Digital Envoy, Inc. v. Google, Inc.</i> , 2005 U.S. Dist. LEXIS 27939 (N.D. Cal., Nov. 8, 2005).....	7
<i>Dionne v. Southeast Foam Converting &amp; Packaging, Inc.</i> , 240 Va. 297, 397 S.E.2d 110 (Va. 1990).....	4
<i>Iconics, Inc. v. Massaro</i> , 266 F. Supp.3d 461 (D. Mass. 2017) .....	7
<i>In re Avaya Inc.</i> , 602 B.R. 445 (S.D.N.Y. 2019).....	8
<i>Kennemore v. Commonwealth</i> , 50 Va. App. 703, 653 S.E.2d 606 (2007).....	8

<i>MicroStrategy Inc. v. Li</i> , 268 Va. 249, 601 S.E.2d 580 (Va. 2004).....	4
<i>Petters v. Williamson &amp; Associates, Inc.</i> , 151 Wn. App. 154, 210 P.3d 1048 (Wash. App. 2009). ....	9
<i>Sargent Fletcher, Inc. v. Able Corp.</i> , 110 Cal. App. 4th 1658 (2003).....	5
<i>Vahdat v. Holland</i> , 247 Va. 417, 649 S.E.2d 691 (2007) .....	5

## STATUTES AND RULES

Va. Code § 59.1-336 .....	9
Va. Code § 59.1-336-343 .....	1
Va. Code § 59.1-338 .....	3, 4
Va. Rules of Evidence, Rule 2:301 .....	5

## **I. Interest of Amicus Curiae**

The American Intellectual Property Law Association (“AIPLA”) is a national bar association representing the interests of approximately 7,000 members engaged in private and corporate practice, government service, and academia. AIPLA’s members represent a diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trade secret, trademark, and copyright law, as well as other fields of law relating to intellectual property. Our members represent both owners and users of intellectual property. AIPLA’s mission includes providing courts with objective analyses to promote an intellectual property system that stimulates and rewards invention, creativity, and investment while accommodating the public’s interest in healthy competition, reasonable costs, and basic fairness. AIPLA has no stake in either of the parties to this litigation or in the result of this case. AIPLA’s only interest is in seeking correct and consistent interpretation of the law as it relates to intellectual property issues. In this brief AIPLA addresses only one of the assignments of error presented by Petitioner Appian Corporation, that the Court of Appeals purportedly erred by reversing the trial court’s decision to give Jury Instruction 14.

## **II. Introduction**

The Uniform Trade Secrets Act has been adopted by 49 states, including

Virginia. Code § 59.1-336-343 (“VUTSA”). A critical aspect of the VUTSA, which is common to every other state’s version of the statute, is that a plaintiff may claim damages “*caused by*” the act of misappropriation. Causation is required whether the plaintiff claims damage based on harm to itself or on the unfair benefit received by the defendant. As with all other elements of the claim, the plaintiff bears the burden of proof on causation. If the plaintiff establishes a prima facie case of proximately caused damage, the defendant then bears the burden to prove offsetting costs, and it may also come forward with evidence to negate the plaintiff’s proof. These fundamental rules are reflected in § 45 of the Restatement (Third) of Unfair Competition (“RUC”).

An appropriate jury instruction on damages would include a statement that the plaintiff bears the initial burden of proving that the claimed damages were proximately caused by the misappropriation. In the instant matter, however, the trial court instructed the jury using an incomplete excerpt from the RUC. The instruction as given could be understood to require the plaintiff to prove only the defendant’s sales, with the defendant having the burden to prove any portion of those sales that were not caused by the misappropriation. As the Court of Appeals explained in reversing the trial court’s judgment, this is not consistent with the plaintiff’s burden to prove causation.

### **III. Argument**

The VUTSA provides that a trade secret plaintiff may recover damages based

on its loss, the defendant's gain, or a reasonable royalty; but each measure rests on proof of causation:

Damages can include both the actual loss *caused by misappropriation* and the unjust enrichment *caused by misappropriation* that is not taken into account in computing actual loss. If a complainant is unable to prove a greater amount of damages by other methods of measurement, the damages *caused by misappropriation* can be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

Code § 59.1-338 (emphasis added).

### **The Plaintiff Has the Burden of Proving Any Damage Was Caused by the Alleged Misappropriation**

The Uniform Trade Secrets Act (the "UTSA") was intended to "codif[y] the basic principles of common law trade secret protection . . . [and] the results of the better reasoned cases concerning the remedies for trade secret protection." 14 U.L.A. 433-434. *See also, Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 205, 788 S.E.2d 237, 259 n. 51 (Va. 2016) (noting also that the statute "displace[d] conflicting tort, restitutionary, and other law" and substituted "unitary definitions of trade secret and trade secret misappropriation.")

The VUTSA permits a plaintiff to claim as damages "both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss." Code § 59.1-338(A). However, because the plaintiff bears the burden of proof to establish the claim of misappropriation, *Dionne v. Southeast Foam Converting & Packaging, Inc.*, 240 Va. 297, 303, 397 S.E.2d 110, 114 n. 2 (Va. 1990), it must specifically demonstrate "a

causal connection between the defendant[s]’ wrongful conduct and the damages asserted.” *Banks v. Mario Indus.*, 274 Va. 438, 455, 650 S.E.2d 687, 696 (Va. 2007).

This principle applies with equal force when the claim is for unjust enrichment, rather than the plaintiff’s loss. *See Advanced Systems Engineering Corp. v. Intuitive IT LLC*, 96 Va. Cir. 245, 251 (2017) (striking jury verdict for lack of evidence of causation: “regardless of the method [of proving damage by loss or unjust enrichment] each was also contingent on presenting evidence of *proximate causation*.”) (Emphasis in original).<sup>1</sup>

The burden of proving proximate causation remains with the plaintiff, “even when a plaintiff has presented a prima facie case.” *MicroStrategy Inc. v. Li*, 268 Va. 249, 265, 601 S.E.2d 580, 590 (Va. 2004) (“The plain language of the [Virginia Uniform Trade Secrets] Act does not provide any burden-shifting requirement.”).<sup>2</sup> Thus, when a plaintiff has satisfied its burden of proving all elements of a claim, including damage, the defendant has the burden of “producing evidence” (or “going

---

<sup>1</sup> The court went on to explain, at 96 Va. Cir. at 253-254, that “even using an unjust enrichment theory . . . , [plaintiff] failed to present any evidence regarding the causal connection between a misappropriation of trade secrets and [defendant’s] profit margin, or even a misappropriation and [defendant’s] gross income increases.”

<sup>2</sup> Even if there were imposed some sort of presumption favoring the plaintiff – which does not exist in a trade secret misappropriation claim – it would not change the burden of proof, but would only affect the burden of coming forward with contrary evidence. *See* Va. Rules of Evidence, Rule 2:301: “Unless otherwise provided by Virginia common law or statute, in a civil action a rebuttable presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof, which remains throughout the trial upon the party on whom it originally rested.”



forward”) to rebut it. *Cf. Balzar & Associates, Inc. v. Lakes on 360, Inc.*, 250 Va. 527, 533, 463 S.E.2d 453, 457 (Va. 1995) (claim of fraudulent transfer of real property); and *Vahdat v. Holland*, 247 Va. 417, 422, 424, 649 S.E.2d 691, 694-695 (Va. 2007) (in a negligence action, defense assertion of sudden emergency requires a “reasonable explanation,” but “[n]otwithstanding this burden of producing evidence in explanation, the ultimate burden remained on plaintiff to prove her case, that is, to show by a preponderance of the evidence that her injuries were caused by the negligence of the defendants.”) (Citations omitted).<sup>3</sup>

In 1995, the Restatement (Third) of Unfair Competition (“RUC”) was published, taking into account the common law of trade secrets as well as the rapidly developing jurisprudence based on the UTSA which sought to codify it. The subject of damages (“monetary relief”) was treated in § 45(1), providing the plaintiff with the greater of its pecuniary loss or the defendant’s gain “*resulting from the appropriation*” of the trade secret. Comment b reinforces this causation requirement, allowing recovery of “any gain acquired by the defendant *as a result* of the appropriation . . . .” Comment c addresses the relationship between compensatory

---

<sup>3</sup> See also *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App.4<sup>th</sup> 1658, 1666-1667 (2003), discussing, in the context of a trade secret misappropriation claim, the distinction between the burden of proof and the burden of producing evidence, and observing, at 1674, that in trade secret cases “discovery affords the [plaintiff] the means to present sufficient evidence to raise an inference [of liability]. The burden of proof remains with the plaintiff, but the defendant must then bear the burden of producing evidence once a prima facie case for the plaintiff is made.” (citations omitted).

damages and restitution, stating that the “better rule permits the *plaintiff to prove* either or both measures” and that restitution effectively compensates the plaintiff for losses “*resulting from* the appropriation.” Comment d adds that the restitution approach “awards to the plaintiff the defendant’s profits earned on sales that are *attributable to the trade secret*.” In Comment f, the latter notion is repeated, emphasizing that restitutionary relief is based on “defendant’s profits on sales *attributable to* the use of the trade secret.” The comment continues:

The general rules governing accountings of profits are applicable in trade secret actions. The plaintiff is entitled to recover the defendant’s net profits. The plaintiff has the burden of establishing the defendant’s sales; the defendant has the burden of establishing any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.

The “sales” which the plaintiff has the burden to prove must be those which are “attributable to” (that is, caused by) the misappropriation; otherwise the plaintiff would be excused from proving in the first instance a basic element of its claim. The court in *Digital Envoy, Inc. v. Google, Inc.*, 2005 U.S. Dist. LEXIS 27939 at \*16 (N.D. Cal., Nov. 8, 2005) stated that “the use of a party’s trade secret need not be the sole source of a defendant’s profits *where a plaintiff has shown some causal nexus* between such profits and the use of its trade secrets.” (Emphasis added.) And in *Iconics, Inc. v. Massaro*, 266 F. Supp.3d 461, 467 (D. Mass. 2017), the court emphasized that “[i]n order to establish defendants’ unjust profits, plaintiffs must ‘do more initially than toss up an undifferentiated gross revenue number; the revenue

stream must bear a legally significant relationship to the infringement.” (Citations omitted.)

### **The Trial Court Erred in Instructing the Jury on the Plaintiff’s Burden to Prove Causation**

Here, the trial court’s Instruction No. 14 was based on a limited excerpt from the Comment f of the RUC that made no reference to the plaintiff’s initial burden to prove causation:

For unjust enrichment, Appian is entitled to recover Pegasystems’ net profits. Appian has the burden of establishing by greater weight of the evidence Pegasystems’ sales; Pegasystems has the burden of establishing by greater weight of the evidence any portion of the sales not attributable to the trade secret or trade secrets and any expenses to be deducted in determining net profits.

This was the only instruction on burden of proof for unjust enrichment, and it easily could have been interpreted by the jury as permitting it to award damages based on all of the defendant’s “sales,” regardless of whether they had any causal connection to trade secret misappropriation.<sup>4</sup> The ambiguity resulting from the missing element of the plaintiff’s burden to prove causation makes the instruction improper. Although it draws on an excerpt from the RUC, “[n]o instruction should be given that incorrectly states the applicable law or which would be confusing or misleading to the jury.” *Kennemore v. Commonwealth*, 50 Va. App. 703, 712, 653 S.E.2d 606, 610 (Va. 2007) (citations and quotation marks omitted). *See also Barney v.*

---

<sup>4</sup> *Cf. In re Avaya Inc.*, 602 B.R. 445, 459 (S.D.N.Y. 2019), explaining that a claim to all of a defendant’s profits required a showing that the trade secrets drove demand for the defendant’s products, drawing on the “entire market value rule” in patent litigation.

*Commonwealth*, 73 Va. App. 599, 612, 863 S.E.2d 877, 883 (2021) (trial court erred in denying supplemental instructions that would have clarified the instruction which, in the circumstances, could have been interpreted by the jury in a way that would lead it to a conclusion inconsistent with the law).

In the only reported case that has addressed the use of this out-of-context excerpt from the RUC in a jury instruction, the appellate court reversed, holding that the instruction “contains the potential for confusion or uncertainty.” *ADA Motors, Inc., v. Butler*, 7 Wn. App.2d 53, 62-64, 432 P.3d 445, 450-451 (Wash. App. 2018). Noting that a prior appellate case<sup>5</sup> had accepted the RUC formulation, the court held that the reference to the plaintiff’s “burden of establishing the defendant’s sales” must be qualified with a statement that the burden is on the plaintiff to prove “sales attributable to the use of a trade secret.” Specifically, the court directed that on remand the instruction should read:

“The plaintiff has the initial burden of proving sales attributable to the trade secret. Then the burden shifts to the defendant to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.”<sup>6</sup>

---

<sup>5</sup> *Petters v. Williamson & Associates, Inc.*, 151 Wn. App. 154, 210 P.3d 1048 (Wash. App. 2009).

<sup>6</sup> See also *Alifax Holding SPA v. Alcor Scientific Inc.*, 404 F.Supp.3d 552, 574 (D.R.I. 2019) (commenting on the same provision of the RUC, stating that “[n]othing in the Restatement’s framework relieved [plaintiff] from its obligation to prove causation in the first instance.”)

## **Appian's Arguments Cannot Justify Ignoring the Statutory Direction That Plaintiff Establish Causation**

In its Petition,<sup>7</sup> Appian presents the question as “whether burden shifting should apply to the calculation of unjust enrichment;” but this is too broad. It fails to distinguish between two types of “shift:” (1) following proof that sales were caused by misappropriation, and (2) after sales are established without proof of causation. In the first case, the defendant is properly called to prove expenses as offsets, as well as to come forward if it has any traverse on causation. In the second case, the defendant is improperly left to disprove the causation that was plaintiff’s burden. It is misleading to instruct the jury that the plaintiff only has to prove “sales,” without clarifying that it must first prove that those sales resulted from the misappropriation.

Therefore, when Appian asserts that other states “have adopted the burden-shifting framework,”<sup>8</sup> it is important to understand that the sort of “shift” those cases confirm are of the first type, and that none of the cited opinions purports to relieve the plaintiff of its burden to establish causation.<sup>9</sup>

---

<sup>7</sup> Petition at 9.

<sup>8</sup> Petition at 13.

<sup>9</sup> See Petition at 13, note 11. In *Caudill*, the jury instruction did not address burden, but did affirm that the profit had to be “attributable to the misappropriated trade secret(s),” 2020 U.S. Dist. LEXIS 101109 at \*91-92; *Cajun* acknowledged that “it is a plaintiff’s burden to establish the defendant’s sales attributable to use of the trade secret,” 2020 U.S. Dist. LEXIS 103597 at \*118; *Agilent* was a Chancery Court bench trial without a jury and addressed only the defendant’s burden “to demonstrate the costs that should be deducted,” 2010 Del. Ch. LEXIS 34 at \*123; *Petters*, as noted above, was overtaken by a later clarifying appellate opinion; *Lockheed Martin* involved no issue regarding a jury instruction or causation, but dealt with a motion in limine challenging the

#### IV. Conclusion

Trade secret misappropriation is fault-based, requiring proof that the defendant “knows or has reason to know” that the secret information was acquired improperly or under a promise of secrecy. Code § 59.1-336. Claims are typically cast in terms of “theft.” Allegations of furtive behavior are common. The claim elements and the resulting trial dynamics are not limited to Virginia but are the same in state and federal jurisdictions throughout the country. In what can be an emotionally-charged environment for trial, it is particularly important that the jury be instructed in clear and unambiguous terms. Given the broad principles defined by statute, such clarity supports the interests of both trade secret rights holders as well as those accused of misappropriation. AIPLA takes no position on whether the relevant instruction in this matter constitutes reversible error. However, AIPLA respectfully submits that, in any case alleging trade secret misappropriation, if there is to be an instruction on shifting burdens regarding damage, the instruction should clarify for the jury that the plaintiff must first establish that the misappropriation was the proximate cause of the

---

reliability of an expert’s opinion; *Cartel* similarly focused on the sufficiency of evidence to support the opinion of an expert that assumed no allocation of profits among product lines, 249 Fed. Appx. 63, 76, 79; in *Micro Lithography* (unpublished, and therefore uncitable under California rules) the jury instruction expressly required a finding of “proximate cause of unjust enrichment,” 1991 WL 332053; and in *Jet Spray Cooler* it was found that “all the sales of the defendants incorporated the trade secrets,” 377 Mass. 159, 174 385 N.E.2d 1349, 1358 (1979).

alleged damage, whether in the form of harm to the plaintiff or improper gain to the defendant.

Respectfully submitted,

By: /s/ Richard T. Matthews  
Richard T. Matthews (VSB# 71241)  
Williams Mullen, P.C.  
301 Fayetteville Street, Suite 1700  
Raleigh, NC 27601  
Phone: (919) 981-4000  
rmatthews@williamsmullen.com  
*Counsel for Amicus Curiae, AIPLA*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was transmitted  
by electronic mail on this April 23, 2025 to:

Monica T. Monday  
Michael J. Finney  
GENTRY LOCKE  
10 Franklin Road S.E., Suite 900  
Roanoke, VA 24011  
(540) 983-9300  
Monday@gentrylocke.com  
Finney@gentrylocke.com

E. Joshua Rosenkranz (Pro Hac Vice)  
Christopher J. Cariello (Pro Hac Vice)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
51 West 52nd Street  
New York, NY 10019  
(212) 506-5000  
jrosenkranz@orrick.com  
ccariello@orrick.com

Eric A. Shumsky (Pro Hac Vice)  
Jeremy Peterman (Pro Hac Vice)  
James A. Flynn (Pro Hac Vice)  
Jonas Wang (Pro Hac Vice)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
1152 15th Street NW  
Washington, DC 20005  
eshumsky@orrick.com  
jpeterman@orrick.com  
jflynn@orrick.com  
jonas.wang@orrick.com  
*Counsel for Appellant*



Ellen D. Marcus  
Sheila M. Costin  
HOLMES COSTIN & MARCUS PLLC  
301 N. Fairfax Street, Suite 202  
Alexandria VA 22314  
(703) 260-6401  
emarcus@hcmlawva.com  
scostin@hcmlawva.com

John M. McNichols  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street, N.W.  
Washington, D.C. 20005  
(202) 434-5000  
jmcnichols@wc.com

Adeel A. Mangi  
Jeffrey S. Ginsberg  
Muhammad U. Faridi  
Abhishek Bapna  
Matthew B. Weiss  
Margaret O'Neil  
PATTERSON BELKNAP WEBB & TYLER LLP  
1133 Avenue of the America  
New York, NY 10036  
(212) 336-2000  
aamangi@pbwt.com  
mfaridi@pbwt.com  
abapna@pbwt.com  
mweiss@pbwt.com  
moneil@pbwt.com

Robert W. Loftin (VSB No. 68377)  
MCGUIREWOODS LLP  
Gateway Plaza  
800 East Canal Street  
Richmond, VA 23219  
(804) 775-4715  
rloftin@mcguirewoods.com

Jonathan Y. Ellis (*pro hac vice*)  
MCGUIREWOODS LLP  
501 Fayetteville Street, Suite 500  
Raleigh, NC 27601  
(919) 755-6688  
jellis@mcguirewoods.com  
*Counsel for Appellee*

This brief contains 2,788 words.

By: /s/ Richard T. Matthews  
Richard T. Matthews (VSB# 71241)  
Williams Mullen, P.C.  
301 Fayetteville Street, Suite 1700  
Raleigh, NC 27601  
Phone: (919) 981-4000  
rmatthews@williamsmullen.com  
*Counsel for Amicus Curiae, AIPLA*